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In The
Supreme Court of the United States
October Term, 1996

FRANCES BERNARD AUER,
et al.
Petitioners,

v.

DONALD A. ROBBINS,
et al.
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE STATES, WISCONSIN, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI

Under the agency interpretation of the Fair Labor Standards Act, 29 U.S.C. § 207 *et seq.*, (the FLSA) at issue, States face paying billions of dollars because, in accounting to their citizens and maintaining republican forms of government, they impose proper discipline on their executives and professionals. The court below, without analysis, assumed the agency interpretation validly applies to public employers. Auer v. Robbins, 65 F.3d 702, 710, n. 6 (8th Cir. 1995), *cert. granted*, 95-897. Whether that assumption is correct is critical to the States' fisc and internal operations, to States accounting

to their own citizenries and to the status of States as coequal sovereigns in our federal system.

Subject to FLSA enforcement (29 U.S.C. § 216 as limited by Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1124-28, 1131-32 (1996)), States must comply with this agency interpretation or risk substantial liability. *E.g.*, Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), *cert. pet. pending*, Wisconsin v. Mueller, No. 95-586; Yourman v. Dinkins, 84 F.3d 655, 656 (2nd Cir. 1996) and cases cited, *cert. pet. pending*, Giuliani v. Yourman, No. 96-152. The appellate court below at least refrained from wholesale abolition of exemptions where discipline contrary to federal agency dictates is only isolated and is corrected by the employer. *Compare* Auer, 65 F.3d at 710-11 *with* Mueller, 54 F.3d at 441-43 and Yourman, 84 F.3d at 655-56. The "window of correction" is a welcome respite to public employers trying to make ends meet. *E.g.*, Auer, 65 F.3d at 710-11. The price of "correction" is to promise future compliance (29 C.F.R. § 541.118(a)(6)), surrendering precisely what the Founders strived to preserve: accountability of local workers through local control. Recognizing other amici will address effects on States' political subdivisions, this brief is submitted to inform the Court why the interpretation is irrational as to States, obstructs public accountability, and may not constitutionally be applied to States.

SUMMARY OF ARGUMENT

An interpretation of the FLSA by the United States Department of Labor (USDOL) mandates the payment of overtime to executives and professionals, whom Congress intended to exempt from those federal mandates, if those executives and professionals are subject to non-safety related disciplinary suspensions for less than full workweek increments. 29 C.F.R. § 541.118(a)(5). USDOL has not reexamined the interpretation since the FLSA was extended to public employers.

1. The agency interpretation is irrational as to all employers, but particularly public employers. It prohibits imposing proper discipline with no apparent connection to the salary criterion it purports to apply. For example, imposing multiple mid-week suspensions, to emphasize they are discipline for misconduct, is barred and only the equivalent of unpaid vacation bracketed by weekends is allowed. It does not relate to whether a worker is an executive or professional. For example, suspending a dentist for one hour is allowed while suspending a psychologist for a full day is not. Applying the interpretation to States is so irrational it is contrary to USDOL's own regulations and how the federal government treats its own workers. USDOL has never articulated any rationale.

2. Prohibiting proper disciplinary suspensions vitiates the critical tool of progressive discipline and contradicts requirements that State employers impose no more and no less than the proper dose of discipline. Even if States try to comply with USDOL dictates, reviewing bodies, by ordering States to impose proper discipline, could jeopardize FLSA exempt status and require State taxpayers to pay wayward employes a windfall of back pay and future overtime pay.

3. Historical records demonstrate the Founders recognized the ability to discipline workers for misconduct is essential to any republican form of government. Controlling official misconduct through pay was, to them, critical to sovereignty and public accountability. Localizing control of misconduct was a central goal of the American Revolution. The USDOL interpretation undermines the delicate balance between the federal and State sovereignties protected by a web of constitutional provisions. The rivalry between vibrant governmental competitors, the Founders' ingenious creation, is sapped at its core. Congress did not intend to force States to breach the duty to their citizens of imposing discipline commensurate with misconduct.

ARGUMENT

Congress could not have intended, under its commerce power, to prohibit States from disciplining workers as required by public accountability.

The FLSA, grounded on the Commerce Clause (Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 530 (1985)), requires employers to pay overtime compensation while exempting executives, professionals and others. 29 U.S.C. §§ 207 and 213(a)(1). USDOL regulations, defining those exemptions, focus on duties and add a "salary" criterion without articulating what that means. 29 C.F.R. §§ 541.1, 541.2 and 541.3. The disciplinary deduction prohibition at issue requires executives and professionals be treated as hourly workers entitled to overtime if an unpaid suspension is imposed for non-safety reasons during any workweek in which any work is performed. 29 C.F.R. § 541.118(a) and (a)(5). The prohibition, as part of the "salary basis test" (29 C.F.R. § 541.118), a mere interpretation (29 C.F.R. § 541.99), is not a law or a regulation. *Cf.* Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1070-72 (1st Cir. 1995); Reich v. State of New York, 3 F.3d 581, 587 (2nd Cir. 1993); Reich v. Parker Fire Protection Dist., 992 F.2d 1023, 1026 (10th Cir. 1993), *rehearing and rehearing en banc denied*. *But see, e.g.*, Mueller, 54 F.3d at 442-43. Though irrational as to all employers, the prohibition, applied to public employers, threatens the core of effective republican governments which the Founders sought to preserve and the Constitution sought to protect.

I. The prohibition is irrational, particularly as to public employers.

As a non-regulatory interpretation, the prohibition is valid only if it is internally persuasive. *E.g.*, Reich v. Newspapers, 44 F.3d at 1070-72; Reich v. New York,

3 F.3d at 587; Reich v. Parker, 992 F.2d at 1026 and cases cited. *See also* John Hancock Life Insurance v. Harris Bank, 510 U.S. 86, 114 S.Ct. 517, 529 and 533 (1993). *But see, e.g.*, Mueller, 54 F.3d at 442-43. The prohibition, as a way to distinguish "salaried" from "hourly" workers, is not internally persuasive. Even if it were a regulation, it would be arbitrary, irrational and invalid as to all employers. 5 U.S.C. § 706(2)(A); Bowman v. City of Indianapolis, 927 F.Supp. 309, 315-16 (S.D.Ind. 1996); Bowman v. State, 573 N.E.2d 910 (Ind.Ct.App. 1991), *cert. denied*, 504 U.S. 986 (1992); Bolick v. Brevard County Sheriff's Dept., 1996 WL 490201, *11 (M.D.Fla. 1996). A few examples show why:

1. If an exempt worker with a four-day workweek admits, one day into a workweek, having stolen employer-owned property and a disciplinary suspension is the proper discipline, no suspension could start until the next workweek. For the three days left in the workweek that theft is admitted, the employer could only suspend the worker with pay or allow the undisciplined worker to stay in the workplace. Requiring pay for a day in which no work is performed is a far cry from the original intent expressed by President Roosevelt when signing the FLSA: "'A fair day's pay for a fair day's work.'" Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942).

2. A suspension of that worker, delayed until the next workweek, for 5, 10, 14, 15 or 30 days would still jeopardize the FLSA exemption. Neither 5, 10, 14, 15 or 30 are divisible by 4, the number of days the worker works. Pay would be deducted during at least one workweek in which work is performed. Barring suspensions calculated in full days has no rational connection to status as an executive or professional.

3. Scheduling several mid-week suspension days, to focus the offending worker on correcting misconduct, is precluded. USDOL requires employers, in

disciplining exempt workers, to give them the equivalent of unpaid vacation time bracketed by weekends.

4. Employers may suspend a dentist or optometrist for an hour's pay without affecting exempt status. 29 C.F.R. § 541.314(b)(1). Suspending a psychologist or a therapist for three full workdays destroys exempt status. 29 C.F.R. § 541.314(c).

5. Reserving suspensions for less than full workweeks to violations of "safety rules of major significance" (29 C.F.R. § 541.118(a)(5)) makes no sense. If USDOL thinks proper discipline of workers risking their own safety may include a two-day suspension, why preclude similar discipline for lying to their employers?

Applying the prohibition to **public** employers contradicts USDOL's own regulations. "[P]ublic accountability" requires that public employers be able to deduct pay for each hour an FLSA exempt employe takes off without permission. 29 C.F.R. § 541.5d(a)(1). USDOL admits, in other words, that treating public workers on an "hourly" basis should be irrelevant to exempt status. Nonetheless, the prohibition would cause complete loss of exempt status if **full** workday disciplinary suspensions occur. Deducting an hour's pay to account for time taken without permission is acceptable. Deducting a full day's pay as discipline, because a worker disobeyed orders not to leave work, destroys exempt status. USDOL, adopting 29 C.F.R. § 541.5d, admitted the public "does not tolerate wasteful and abusive excesses such as padded payrolls or 'phantom' employes." 57 Fed. Reg. 37673 (August 19, 1992). Yet the disciplinary deduction prohibition obstructs State efforts to address those very abuses.

The USDOL exemption structure is so contrary to public accountability that the Civil Service Commission, applying the FLSA to federal employers, rejected "salary" (and thereby the prohibition) as a way to determine exempt status. 40 Fed. Reg. 27640-27641 (July 1, 1975);

5 C.F.R. Part 551, Subpart B. Since salary does not appear, as a potential exemption criterion for public employers, in the statute (29 U.S.C. § 213(a)(1)) or legislative history (1966 U.S. Code & Admin. News 3002; 1974 U.S. Code & Admin. News 2811), these rational regulations, recognizing public accountability, are valid. Realizing suspensions are vital to public accountability, Congress has authorized federal employers to discipline misconduct with open-ended suspensions. *E.g.*, 5 U.S.C. §§ 7501(1) and 7503(a) (suspensions ranging from 1 to 14 days for repeated "discourteous" behavior towards public); 2 U.S.C. § 60-1 (Congressional employers). USDOL is itself able to impose open-ended suspensions while still exempting its own executives and professionals. 29 U.S.C. § 204(f); 5 C.F.R. Part 551, Subpart B.

No rationale was articulated for the prohibition much less for applying it to public employers. The Weiss Report, a half-century old, was USDOL's sole explanation of any version of the prohibition. H. Weiss, Report and Recommendations on Proposed Revisions of Regulations, Part 541 24-26 (USDOL June, 1949). USDOL rejected the Weiss Report recommendation by adopting the salary basis test without **any** disciplinary deduction prohibition. 14 Fed. Reg. 7703 (December 28, 1949).

USDOL next addressed the issue in 1954, when it proposed amending the salary basis test to prohibit most disciplinary deductions while allowing deductions for "major disciplinary reasons." 19 Fed. Reg. 1321-1322 (March 9, 1954). This broader exception was deleted from the final amendments in response to undisclosed "comments." 19 Fed. Reg. 4405-4406 (July 17, 1954). The prohibition, as first adopted in 1954, continues unaltered to the present date and has not since been reexamined. 57 Fed. Reg. 37672, n. 11 and 37674 (August 19, 1992).

Had the Weiss Report recommendations not been rejected by USDOL, and had the prohibition, adopted five years later without explanation, not been different, the

prohibition would still lack articulated rationale. The Weiss report recommended prohibiting **all** disciplinary deductions: (1) for administrative convenience and (2) because few private employers then covered ever disciplined exempt workers. The Weiss Report at 24-26. Even without constitutional concerns, courts are skeptical of rationales of administrative convenience if the results of the chosen course are confusing and complex (*e.g.*, Cottage Savings Ass'n v. Commissioner, 499 U.S. 554, 565-66 (1991)) as here (*e.g.*, Yourman, 84 F.3d at 655-56). A cursory look at modern employment law confirms that assuming employers rarely discipline their executives and professionals under **any** circumstances, if ever correct, is now woefully outdated. Professionals alone are 15% of the workforce. U.S.News & World Rpt. 12 (Sept. 9, 1996).

After the FLSA was extended to nearly all public workers, USDOL should have decided how the exemptions would operate in the public sector. Between this extension of the FLSA to public employers being stayed (National League of Cities v. Brennan, 419 U.S. 1321, 1323 (1974)) and Garcia issuing in 1985, USDOL did nothing. In 1985, USDOL, recognizing problems between civil service systems and its salary criterion, and that federal workers had not been governed by any salary criterion during the prior decade, asked for comments on whether its salary criterion should be entirely abandoned. 50 Fed. Reg. 47696-47997 (November 19, 1985).

Since 1985, USDOL has deflected public and private objections to the salary criterion, the salary basis test and the prohibition into a separate black hole through which it defers reconsideration with constantly retreating deadlines. 51 Fed. Reg. 2525 (January 17, 1986); 54 Fed. Reg. 44836-44837 (October 30, 1989); 55 Fed. Reg. 16372 (April 23, 1990); 55 Fed. Reg. 44639 (October 29, 1990); 56 Fed. Reg. 17537 (April 22, 1991); 56 Fed. Reg. 45824 (September 6, 1991); 56 Fed. Reg. 53567 (October 21, 1991); 57 Fed. Reg. 16960 (April 27, 1992); 57 Fed. Reg. 51565 (November 3, 1992); 58 Fed.

Reg. 24569 (April 26, 1993); 58 Fed. Reg. 56587 (October 25, 1993); 59 Fed. Reg. 20610 (April 25, 1994); 59 Fed. Reg. 57129 and 57140 (November 14, 1994); 60 Fed. Reg. 23544-23545 (May 8, 1995); 60 Fed. Reg. 59613-59614 (November 28, 1995); 61 Fed. Reg. 23238-23240 (May 13, 1996). Though recognizing its entire exemption structure is "sorely out of date" and fraught with "confusion" (59 Fed. Reg. 57129 and 57140 (November 14, 1994); 60 Fed. Reg. 23544 and 23545 (May 8, 1995)), USDOL continues to defer these deadlines. Responding to specific public employer objections to parts of the salary basis test, it admitted the core of the test is antithetical to public employment. 29 C.F.R. § 541.5d; 57 Fed. Reg. 37666-37677 (August 19, 1992). Even then, USDOL ignored pleas to look at the disciplinary deduction prohibition:

> Section 541.118(a)(5) was not open for comment during the present rulemaking. However, [USDOL] expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date.

57 Fed. Reg. at 37674. Kafka's parable comes to mind:

> Before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. "It is possible," says the doorkeeper, "but not at the moment. . . . "

Kafka, "Before the Law", Franz Kafka: The Complete Stories 3-4 (Glatzer ed. 1972). The man remains, receiving sporadic hopes of entry at constantly retreating moments, until he dies and the door, having served its purpose, is closed. *Id.* The duty of States to account to their citizens, and federal obstruction of that duty, merit careful consideration.

II. Public accountability is best served through no more and no less than the proper dose of discipline.

A. The prohibition deprives States of the vital tool of progressive discipline.

Suspensions are usually part of a "progressive discipline" process which seeks to correct misconduct, rather than punish, by rationally assessing discipline appropriate to the misconduct and to prior disciplinary history. *E.g.*, Buhler, *Administering Discipline in the Organization: Managing in the 90s,* 17 Supervision (November 1, 1993), 1993 WL 2952158. Progressive discipline policies may be crucial in evaluating challenges to discipline taken by public employers. *E.g.*, Harrison v. Metro Government of Nashville, 80 F.3d 1107, 1111, 1117 (6th Cir. 1996) (pretext where another employe disciplined less severely); Tennes v. Com. of Mass., Dept. of Revenue, 944 F.2d 372, 379 (7th Cir. 1991) (same). *See* Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979).

Congress did not intend, by extending the FLSA to all public employers, to create substantial disparities in the discipline imposed upon public workers solely because they are "exempt" or "non-exempt" under the FLSA. Assume two workers with similar employment profiles. Each engages in misconduct so similar any reasonable employer would impose a two-day suspension on each worker. If the exempt worker is reprimanded while the non-exempt worker is suspended, the non-exempt worker may allege irrationality or illegal discrimination. By contrast, if the exempt worker is suspended for five days while the non-exempt worker is suspended for two days, the exempt worker may allege irrationality or illegal discrimination. Articulating rationality would be an elusive task, particularly if gender or race issues heighten scrutiny by reviewing bodies.

The cost to taxpayers of disrupting progressive discipline just begins with the liability threatened by the USDOL prohibition. Measured State directives to fulfill accountability duties are disrupted by USDOL's irrational prohibition. *E.g.*, State Ap. 123-125 (Colorado statute, fining State supervisors at least "three days salary" for failing to monitor subordinates' performance of public duties, recast to fit within USDOL confines on discipline in response to FLSA court claims). Progressive discipline seeks to correct misconduct so workers become productive. Replacing a worker costs far more than keeping a current worker. *E.g.*, Romano, "Pick up your Pencils: Use of Tests for Job Applicants," 5 Management Review (Aug. 1, 1994), 1994 WL 2813823 ("The cost of replacing managerial-level employees is 150 percent of their salaries"); Emerson, *Tips to Transcend the Turnover Trap,* 16, § 1 Minneapolis/St. Paul City Business (July 7, 1995), 1995 WL 8233929. "Discipline -- just like rewards -- can be a motivating factor if appropriately administered" and "[p]rogressive discipline is the best approach to disciplinary action." Buhler, *Administering Discipline in the Organization: Managing in the 90s,* 17 Supervision (November 1, 1993), 1993 WL 2952158. "People feel unjustly treated (and rightly so) if a minor infraction is disciplined with the same measures as a major infraction." *Id.* Imposing no discipline "can be just as costly as" imposing improper discipline because "'good' employes" become demoralized and this "often results in diminished performance levels among the 'good' employes." *Id.*

Requiring States to impose improper discipline disrupts more than the federal-State balance and State budgets. The balance, particularly in civil service systems, between a government and its workers is also disrupted. If an employer responds too leniently, the worker may be lulled into future misconduct. If an employer responds too harshly, the relationship may be ruptured. The USDOL prohibition does not just deprive State employers of one disciplinary tool among their "arsenals of disciplinary remedies" (Mueller, 54 F.3d at

443) which States should not have to surrender. The prohibition, for no valid reason, distorts and vitiates the corrective messages wayward workers must receive in the right dose to return to proper public service.

B. The discipline imposed by public employers is regularly scrutinized to assure it is commensurate with the misconduct.

As with many general principles of critical importance, the importance of States having power to impose proper discipline can be minimized by asking what difference it makes if a particular employe is suspended for five rather than three days. *E.g.*, Mueller 54 F.3d at 441-43. Even at the level of individualized analysis, however, the public demand for accountability shines through. The discipline imposed by State and local employers is frequently scrutinized to assure it is commensurate with the underlying misconduct rather than arbitrary and capricious. *E.g.*, Blake v. State Personnel Bd., 25 Cal.App.3d 541, 102 Cal.Rptr. 50, 57-58 (Ct.App. 1972); Adkins v. Div. of Youth Services, Dep't of Institutions, 720 P.2d 626, 627-29 (Colo.Ct.App. 1986), *rehearing denied, cert. denied*; Kaminsky v. Bd. Fire Commissioners of Village of Wheeling, 201 Ill. App. 3d 262, 559 N.E.2d 87, 88, 91, 147 Ill.Dec. 87 (Ct.App. 1990); Gerhold v. New Orleans Police Dep't, 503 So.2d 206, 207-08 (La.Ct.App. 1987), *rehearing denied, writ denied*; Walcott v. City of Plainfield, 282 N.J.Super. 121, 659 A.2d 532, 533-35 (Ct.App. 1995); Clark v. Canandaigua City School Dist., 179 A.D.2d 1006, 579 N.Y.S.2d 275, 276 (Ct.App. 1992), *aff'd*, 602 N.E.2d 228 (N.Y. 1992); Brown v. Ohio Bureau of Employee Services, 70 Ohio St.3d 1, 635 N.E.2d 1230, 1231 (1994); Reichenbach v. Civil Service Comm'n of Borough of Wilkinsburg, 53 Pa.Cmwlth. 363, 417 A.2d 1292, 1294 (1980); In re Butner, 39 Wash.App. 408, 693 P.2d 733, 738 (1985). *review denied*; State ex rel. Smits v. City of De Pere, 104 Wis.2d 26, 310 N.W.2d 607,

611-12 (1981). *See also* City of St. Louis v. Praprotnik, 485 U.S. 112, 114 (1988) (noting suspension rejected as "too harsh"). Federal employer discipline decisions may also be rejected as "too harsh". *E.g.*, Ward v. Brown, 22 F.3d 156, 519-20 (2nd Cir. 1994); Brown v. U.S. Postal Service, 860 F.2d 884, 888 (9th Cir. 1988); Boyce v. United States, 543 F.2d 1290, 1292-96 (Ct.Cl. 1976).

Reviewing bodies which deem discipline imposed by State and local employers "too harsh" compared to the misconduct or the treatment of other employes may reject that discipline. *E.g.*, Kaminsky, 559 N.E.2d at 88, 91; Community College Dist. 508 v. McKinley, 160 Ill.App.3d 916, 513 N.E.2d 951, 956, 112 Ill.Dec. 342 (1987) (discharge rejected because other workers not discharged); Massingale v. Police Bd. of City of Chicago, 140 Ill.App.3d 378, 488 N.E.2d 1289, 1292, 94 Ill.Dec. 896 (1986), *appeal denied*; Taylor v. Dep't of Health and Human Resources, 491 So.2d 752, 755-56 (La.Ct.App. 1986) (discharge arbitrary because "too harsh"); In re Kennedy, 442 So.2d 566, 569 (La.Ct.App. 1983); Walcott, 659 A.2d at 533; Town of Belleville v. Coppla, 187 N.J.Super. 147, 453 A.2d 1344, 1346 (1982); English v. College of Medicine & Dentistry of New Jersey, 73 N.J. 20, 372 A.2d 295, 296 (1977); Township of Moorestown v. Armstrong, 89 N.J.Super. 560, 215 A.2d 775, 779 (Ct.App. 1965), *certification denied*; Gallagher v. Cawley, 43 A.D.2d 931, 353 N.Y.S.2d 3, 4 (Ct. App. 1974); Brown, 635 N.E.2d at 1231; Lower Merion Township v. Turkelson, 396 Pa. 374, 152 A.2d 724, 726 (1959); Reichenbach, 417 A.2d at 1294; Smits, 310 N.W.2d at 608. *See* Ward, 22 F.3d at 519-20.

Even if public employers try to comply with the prohibition, reviewing bodies, by forcing public employers to impose proper discipline, may require pay deductions during workweeks when work is performed and jeopardize FLSA exempt status. *E.g.*, Farmers Insurance Group v. Santa Clara County, 11 Cal.4th 992, 906 P.2d 440, 445, 47 Cal.Rptr.2d 478, 483 (1995) (suspension reduced to "two days"); Walcott, 659 A.2d at 533 (discharge reduced

to 6 month suspension); Kaminsky, 559 N.E.2d at 88, 91 (court rejected discharge and, after remand, reduced two consecutive 25-day suspensions to one 30-day suspension); Town of Belleville 453 A.2d at 1346 (agency reduced discharge to 60-day suspension and court increased to 6 month suspension); Town of West New York v. Bock, 38 N.J. 500, 186 A.2d 97, 100 (1962) (suspension reduced); In re Appeal of Fuller, 25 Pa.Cmwlth 116, 358 A.2d 756, 756-58 (1976) (same); English, 372 A.2d at 296 (appellate court reduced supervisor's discharge to 1 year suspension and supreme court returned to discharge); Township of Moorestown, 215 A.2d at 779 (agency reduced discharge to 6 months suspension and court returned to discharge); Gallagher, 353 N.Y.S.2d at 4 (court reduced discharge to 30 days suspension from date of order); Brown, 635 N.E.2d at 1231 (circuit court reduced discharge to 10-day suspension, appellate court returned to discharge and supreme court reduced to 10-day suspension); Lower Merion Township, 152 A.2d at 726 (agency rejected discharge ordering reinstatement on set date without back pay); Reichenbach, 417 A.2d at 1294 (court reduced discharge to suspension declaring power to suspend at any level it "'deems proper'"); Smits, 310 N.W.2d at 608 (employer barred from suspending for "52 work weeks" since different from "one year" ordered by court). Reviewing bodies also change discipline imposed by federal employers. *E.g.*, Gulf Coast Industrial Workers Union v. Exxon Co., U.S.A., 991 F.2d 244, 247 (5th Cir. 1993) (discharge rejected and reinstatement required without backpay). As Smits notes, calculating time in "workweeks" differs from calculating time in years. 310 N.W.2d at 608. Since months often begin midweek, calculating "workweeks" and "months" also differs.

If a public employer, squeezing within the narrow confines of the prohibition, violates its duty to impose proper discipline of an exempt employe, reviewing bodies can, by requiring proper discipline, still cause a loss of exempt status. Offending employes who engage in misconduct and abuse the public trust could then receive

a windfall of back pay and future overtime from State taxpayers. As demonstrated below, the Founders never conceived the federal government could wreak such havoc.

III. Applying the prohibition to States breaches constitutional boundaries.

A. The Founders assumed it was central to any republican government to control its own workers with suspensions and pay deductions.

The Founders assumed that the republican forms of government Congress was to guarantee (U.S.Const., Art. IV, § 4) and the powers reserved to the States (U.S.Const., Amend X) included States controlling their workers through suspensions and pay deductions. They knew disciplining misconduct through monetary sanctions was central to accountability and effective government. "The power of the purse was to them the determinant of sovereignty." E. Ferguson, The Power of the Purse: A History of American Public Finance, 1776-1790 xiv-xv (1961).

The Revolution was largely a struggle over central or local control of public officials. *E.g.*, T. Draper, A Struggle for Power: The American Revolution 377-81 (1996); Nelson, *A Short, Ironic History of American National Bureaucracy*, 44 J. Politics 747, 750 (1982). The "country was conceived as much in anger as in liberty" over Britain's royal officials serving "'at colonial expense.'" Nelson at 750. The Declaration of Independence charged the King made "'judges dependent on his will alone'" for "'the amount and payment of their salaries'" and "'sent hither swarms of officers to harass our people and eat out their subsistence.'" *Id.*; A. Schlesinger, Prelude to Independence 12-13 (1958); Freytag v. C.I.R., 501 U.S.

892, 905, n. 4 (1991) (Scalia, O'Connor, Kennedy and Souter, JJ., concurring). At the time of the Revolution, the "prevalence of vice and corruption that many Americans saw in their midst" fueled "their desire to be republican" and became "perhaps in the end the most important stimulus to revolution." G. Wood, The Creation of the American Republic, 1776-1787 107 (1969).

By the mid-1600s "the distinction between local and central authority became clear" and colonial leaders wielded "every weapon" to reduce the power of royal officers. Bailyn, "Political and Social Structure in Virginia," Seventeenth Century America: Essays in Colonial History 102, 113 (J. Smith, ed. 1959). Colonies wrested some limited appointive authority from Britain. II H. Osgood, The American Colonies in the Seventeenth Century 230-31 (1904); I. Christie, Crisis of Empire: Great Britain and the American Colonies 1754-1783 20-21 (1967). Colonists knew that, even without appointive authority, controlling an official's pay controlled the official. Britain, requiring colonies to pay its appointed officials, tried to make them pay fixed amounts. *E.g.*, 1 H. Osgood, The American Colonies in the Eighteenth Century 155-56 (1924); 3 Osgood 18th at 323-24. The locally-elected assemblies assumed authority over officials by deciding when and how much they were paid. *Id.*; 4 Osgood 18th at 128. *See also* Draper at 37-41, 57-61, 172.

The assemblies developed three means to control royal officials: (a) ignoring fixed amounts Britain mandated and deciding for themselves how much to pay; (b) evaluating proper amounts after services were rendered; and (c) suspending or reducing pay in response to misconduct. 2 Osgood 18th at 132; 3 Osgood 18th at 322; 4 Osgood 18th at 53. *See* Christie at 20-21; 1 S. Morison, H. Commanger & W. Leuchtenberg, The Growth of the American Republic 84-85, 123 (6th ed. 1969). Assemblies vigorously asserted the amount and timing of those payments were their decisions. 1 Osgood 18th at 155-56; 2 Osgood 18th at 132-34, 136, 138; 3 Osgood 18th

at 215, 313, 322, 558-59; 4 Osgood 18th at 12, 20, 53, 123-24, 128, 230. Assembly members who challenged assembly efforts to control payments to officials were themselves disciplined. 2 Osgood 18th at 100.

A Massachusetts Council assistant (I Osgood 17th at 232), a New Netherlands vice-director (II Osgood 17th at 112) and a Virginia customs official (III Osgood 17th at 218) were each suspended. Militia members were fined for every training day they failed to attend. I Osgood 17th at 503 and 507. Suspensions were imposed on two North Carolina council members for misusing public funds (4 Osgood 18th at 211), five New York council members for corruption (1 Osgood 18th at 273) and a Virginia deputy auditor for dragging his feet in keeping account books (2 Osgood 18th at 242). Displeased with the Pennsylvania Governor, its assembly "stopped" his salary until he conformed. 4 Osgood 18th at 60, 66. The New York assembly, upset with a judge, "reduced" his salary. 2 Osgood 18th at 426-27, 429-30. The New York assembly reduced the pay of other officials for similar reasons. *Id.* at 430. Assemblies asked Governors to suspend other officials for misconduct. 2 Osgood 18th at 56.

From the mid-1700s forward, advocates of strong centralized government argued the power over payments to officials, which assemblies had seized, must be returned to Britain. A former governor admitted assemblies strove to control officials' pay to "prevent the misapplications of public money." T. Pownall, The Administration of the Colonies (1764) in 2 The Annals of America 98, 102 (1968). Nonetheless, he complained that assemblies having "withheld or reduced [an official's pay] on occasions where they have had reason to disapprove . . . [of] his conduct" had rendered the "officers of the Crown dependent on and governed by the assemblies." *Id.* Other governors denounced assemblies having usurped the power to discipline royal officers. 4 Osgood 18th at 143.

Britain reacted by imposing taxes under the Townshend Acts "to support the governors and judges in those colonies where assemblies wielded their power to withhold salaries as a club over royal officials." L. Gipson, The Coming of the Revolution: 1763-1775 174-75 (1954). John Dickinson, often accommodating to a fault, responded it was impossible "'to form an idea of slavery more *compleat*, more *miserable*, more *disgraceful*, than that of a people where *justice is administered*, *government exercized* . . . AT THE EXPENSE OF THE PEOPLE, and yet WITHOUT THE LEAST DEPENDENCE ON THEM'" and warned that if "'we can find no relief from this infamous situation . . . we may bow down our necks, with all the stupid serenity of servitude, to any drudgery which our lords and masters may please to command.'" B. Knollenberg, Growth of the American Revolution: 1766-1775 52 (1975). The Revolution nearly began then with cries of "taxation without representation" and claims that removing pay decisions from the colonies violated the British Constitution. Gipson at 185-86. By backing down, Britain delayed war for several years, but its intent to reassert control over officials' pay was known and the breach irreconcilable. *Id.* at 186-95; Christie at 71-78.

With independence, the newly forged States used suspensions and pay deductions to assume control over their officials. Rhode Island "pushed the [Loyalist] executive out of the way [in 1775] by suspending him from office" and later replacing him. A. Nevins, The American States During and After the Revolution, 1775-1789 80 (1924). The States each framed "Constitutions [which] made it clear that the civil officers were instruments of the whole people: 'Magistrates are their trustees and servants, and at all times amenable to them', the Virginians put it." *Id.* at 165. What was revolutionary, historians conclude, was neither the war nor anything the Continental Congress did but rather the drive by colonists to establish republican forms of government in their own States. *E.g.*, Wood, at 128 and 134 ("Nothing . . . engaged

the interests of these Americans more than the framing of these separate [State] governments" which they viewed as "'the most important [affair] that has been transacted in any nation for some centuries past'").

Madison later declared, in the Virginia ratifying convention, that the "appointment and payment of executive officers . . . was 'the most delicate part in the organization of a republican government' and 'the most difficult to establish on unexceptionable grounds.'" Wood, at 551. He defined a republican form of government as one "administered by persons holding their offices during pleasure, for a limited period, or during good behavior." The Federalist, No. 39, p. 251 (Cooke ed. 1961). He expected the national government, in setting the "tenure of the ministerial offices," to follow "the example" of the States. *Id.* at p. 253. An "example" to which Madison likely referred was the experience of his friend, Governor Thomas Jefferson, in Madison's Virginia, just a few years before the Constitutional Convention. Shortly after General Lee of Virginia was discharged by Congress,[1] Governor Jefferson analyzed whether the State Executive or State Assembly "may remove officers of the line [i.e., military officers] or staff." Jefferson, "Notes concerning the Right of Removal from Office", 4 The Papers of Thomas Jefferson: 1 October 1780 to 24 February 1781 281-82 (J. Boyd, ed. 1951). To Jefferson, the "question principally affects the Staff, whose rapacity, inattendance and means of evasion require energetic superintendence." *Id.* at 281. He concluded it implicated "Republican form

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[1]Washington charged General Lee with misconduct at the Battle of Monmouth, where many lives were lost, and Lee was suspended for a year. R. Dupuy & T. Dupuy, The Compact History of the Revolutionary War 286 (1963). After writing Congress an insulting letter, he was discharged. *Id.* Progressive discipline has a long history. I Osgood 17th at 232 (in 1630s); 2 Osgood 18th at 122 (in early 1700s); L. White, The Federalists: A Study in Administrative History 184, 425-26 (1948). (in 1790s).

and principles" for the State Executive to have power to remove Staff, if not military officers, and that, without that power, the "[c]onsequences" would be grave because the State Executive could not "dismiss nor **suspend** the most pettifogging and rascally officer." *Id.* at 282; emphasis added. Jefferson then listed professions in the Staff which had apparently required discipline during the short time he had been Governor. *Id.* at 282, text and f/n.

The new States imposed discipline on their officials before and as the Constitutional Convention was held. *E.g.*, E. Spaulding, New York in the Critical Period, 1783-1789 13 (1932) ("[r]esolutions were passed to penalize tax collectors for their delinquencies.") Maryland deducted pay from legislators, for each day absent without excuse, to control "poor attendance" and to assure public business could be conducted. C. Everstine, The General Assembly of Maryland, 1776-1850 33, 152-55 (1982). A 1783 Vermont law fined assembly members "for every day" of absence. Vermont State Papers: 1779 to 1786 446 (W. Slade ed. 1823). *See also* C. Everstine, The General Assembly of Maryland, 1634-1776 40, 41, 60, 74, 357 (1980) and J. Munroe, Colonial Delaware: A History 96 (1978) for daily pay deductions in colonial period.

Colonial practices of suspending officials, and deducting their pay, for unexcused absences and other violations of the public trust were continued. *E.g.*, Tshudy, "Compilation of Qualifications and Charges and Punishments afforded Members of the Pennsylvania House of Representatives, 1682-1980" in Report on the History of Disciplinary Actions in the Pennsylvania House of Representatives (1980). Legislators were suspended for "not upholding the responsibilities of their position." *Id.* at 4. Before 1787, more than fifty Pennsylvania legislators were "fined" for unexcused absences or tardiness. *Id.* at 1-20. Unexcused absences were even punished by members "forfeiting [their] whole wages during that sitting." *Id.* at 15.

Penalizing public servants for unexcused absences, and linking discipline power with accountability, was axiomatic. U.S.Const., Art. I, § 5, cl. 1. "Each House" of Congress was given power "to compel the Attendance of absent Members, in such manner, and **under such Penalties** as each House may provide." *Id.*; emphasis added. Madison cosponsored the motion to add this provision. 1 M. Farrand, Debates of the Convention 253-54 (rev. ed. 1937). It was "[a]greed to by all [States] except Pena. which was divided." *Id.* Ratification was furthered because the Constitution left it to each federal legislative body to "compel the attendance of its own members." 3 Farrand Debates 252. The power to decide appropriate penalties plainly lies solely with each body. Kilbourn v. Thompson, 103 U.S. 168, 190 (1880), *criticized on other grds.*, Hutcheson v. United States, 369 U.S. 599, 613 (1962). The Founders assumed each government, to account to its citizens, must control discipline within that government. Hamilton declared that a government must "promot[e] punctuality" (The Federalist, No. 75, p. 508 (Cooke ed. 1961)), that "A POWER OVER A MAN'S SUBSISTENCE AMOUNTS TO A POWER OVER HIS WILL (The Federalist, No. 79, p. 531 (Cooke ed. 1961)) and that "[t]hose who pay are the masters of those who are paid" 1 Farrand, Debates 373. The delegates, "subject to recall at any moment" by the State legislatures which appointed them (M. Farrand, The Framing of the Constitution of the United States 3, 10-11 (1913)), began the Convention by "provid[ing] agst. interruption of business by absence of members" (1 Farrand Debates 13, 15 and 17).

The Convention debated proposals to suspend impeached officials pending trial. 2 Farrand Debates 64-69, 612-13. In July 1787, eight States approved, and only two States disapproved, that proposal. *Id.* at 69. In the closing days, after the Convention carefully balanced the separation of powers, the question arose again. *Id.* at 612. Madison argued the President was already too dependent on the Legislature through its power to try an

impeached President and that an "intermediate suspension" would allow the Legislature to "make way for . . . another who will be more favorable to their views" by "vot[ing] a temporary removal of the existing Magistrate." *Id.* at 612-13. Though Madison's appeal to the countervailing interest of preserving separation of powers apparently persuaded eight States to vote against the proposal, three States still voted to suspend impeached officials pending trial. *Id.* at 612-13.

The Pinckney Plan would have granted the President, as opposed to Congress, the power to "suspend Officers, civil and military." 2 Farrand Debates 158. The Constitution remained silent and the authority to remove "'inferior officers'" of the national government was left divided between the Executive and the Legislature. *E.g.*, Freytag v. C.I.R., 501 U.S. 868, 883 (1991); Bowsher v. Synar, 478 U.S. 714, 729 (1986). It was never questioned that the federal and State governments should each have the power to discipline their own employes.

The colonies had developed governmental skills it took the fledgling federal government decades to develop.[2] Ferguson, at 48-49, 50-51, 52-53, 100-101; Gipson at 27 (as of 1763, "the ability of the colonists to manage their own governmental affairs with competence and economy is indicated on every hand by a study of local and provincial records"). Some colonies, even before 1700, "possessed all the organs of statehood" with "their own distinct executives and legislatures, their officials, courts, militia systems, their systems of revenue and expenditures, their ecclesiastical systems, and their institutions of local government." II Osgood 17th at 436-37. The States were ready to discipline their own officials as public accountability required. When the

[2]The new federal government promptly imposed disciplinary pay deductions, e.g., on postal carriers for late deliveries and on tax commissioners for missing meetings. White at 426.

colonies authorized Congress to declare independence, they expressly reserved the regulation of internal concerns. *E.g.* Editors, *The States and the Congress Move Towards Independence,* 6 Publius 135, 139, 142 (Winter 1976). The Founders would have considered it inconceivable to construe the commerce power as allowing Congress, much less a federal agency acting arbitrarily, to usurp discipline of State officials from the States.

B. Congress may not constitutionally bar States from properly suspending workers.

Congress may not constitutionally prohibit States from suspending workers commensurate with misconduct. The Founders deemed it basic to republican forms of government to control and discipline workers through their pay. The interplay between the limits of the Commerce Clause, the restraints of the Necessary and Proper Clause, the rights reserved under the Tenth Amendment and Congress's affirmative duties under the Guarantee Clause make it clear that Congress can not deprive States of those sovereign rights. U.S.Const., Art. I, § 8, cl. 3 and cl. 18, Art. IV, § 4, Amend. X.

Constitutional concerns were raised simply by Congress having extending the FLSA to the States. New York v. United States, 505 U.S. 144, 160 (1992). The appellate court below, neither noting nor analyzing any constitutional concerns, instead assumed, based on Mueller, that the USDOL prohibition was valid in the public sector. Auer, 65 F.3d at 710, n. 6. Mueller, in turn, dismissed constitutional concerns by asking why States, retaining other disciplinary "options", do not surrender, to the will of USDOL, their power to impose proper discipline. 54 F.3d at 442-43. The correct focus is that the constitutional provisions involved preclude a statute, not to mention a USDOL interpretation, from forcing States to surrender a reserved power (U.S.Const.,

Amend. X) which Congress must affirmatively protect (U.S.Const., Art. IV, § 4). If a federal agency, through a non-regulatory interpretation the judiciary declines to question, is able to force a State to impose arbitrary discipline, the surrender would be complete. States could thereafter maintain their disciplinary structures only at the unmonitored whim of those federal agencies.

Constitutional concerns may not be dismissed because State employers have disciplinary "options" other than the suspensions USDOL allows. A demonstration may not be prohibited because the demonstrators have a printing press. Blacks may not be barred from a white school because a black school also exists. USDOL, under the FLSA, may not require States to forego proper discipline in favor of improper alternatives. To say "other options" exist is no answer to constitutional concerns.

Until the Court "more recently departed" in Garcia from its traditional approach, the Court had, in examining if States may be subjected to generally applicable federal statutes, balanced federal interests against "the degree to which such laws would prevent the State from functioning as a sovereign; that is, the extent to which such generally applicable laws would impede a state government's responsibility to represent and be accountable to the citizens of the State." New York, 505 U.S. at 177. In the present case, an application of the statute Garcia sanctioned, the FLSA, returns for deeper consideration.

Garcia concluded that the political process, not courts, should detect and enforce lines dividing mandates to States permissible under the Commerce Clause and impermissible under the Tenth Amendment. 469 U.S. at 553-54. It turned on the premise that "[t]he political process ensures that laws that unduly burden the States will not be promulgated." *Id.* at 555-56. The Court now realizes this premise, outdated when pronounced (*e.g.*, Pittinger, "*Garcia* and the Political Safeguards of Federalism: Is There a Better Solution to the Conundrum

of the Tenth Amendment", 22 Publius 1-19 (Winter 1992)), is a meager safeguard for State sovereignty. *E.g.*, New York, 505 U.S. at 159, 177; U.S. Term Limits v. Thornton, 115 S.Ct. 1842, 1852-60 (1995); and *id.*, 115 S.Ct. 1872-75 (1995) (Kennedy, J., concurring). *See* New York, 505 U.S. 188, 202 (1995) (White, Blackmun & Stevens, JJ., concurring and dissenting) construing New York as being at odds with this premise in Garcia.

Even this meager safeguard vanishes unless, in examining the extension of generally applicable federal statutes to States, courts are:

> absolutely certain that Congress intended such an exercise [of its powers]. "[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." [Citation omitted.]

Gregory v. Ashcroft, 501 U.S. 452, 464 (1991). A court examining if Congress intended to apply the disciplinary deduction prohibition to public employers would be hard pressed to be "absolutely certain" Congress intended to exercise its powers in that manner. *Id.* Simply applying Garcia, with the Gregory admonition, would render the prohibition invalid as to public employers.

This rule of statutory construction is vitally important. The accountability of federal and state workers to their respective citizenries must be kept separate and clear. New York, 505 U.S. at 168-69, 182-83. If federal overreaching forces a State action, the accountability of both State and federal governments are improperly curtailed because citizen anger is misdirected. *Id.* If a federal agency forces States to impose improper discipline, the instigator, the federal agency, may escape citizen reaction. If a State loses litigation challenging that improper discipline, adverse reaction will focus on

the State, not the federal, government. If a State, because it imposed proper discipline contrary to USDOL whim, must treat its executives and professionals as overtime employes and pay out millions of dollars, citizens will direct anger towards the State government.

Respecting State sovereignty bolsters the vitality of the federal government. Dual sovereignties are intended to create competing healthy governments which motivate workers to perform well for the public. Yarbrough, "Federalism in the Foundation and Preservation of the American Republic", 6 Publius 43, 55 (1976). If any competing government becomes anemic, the people suffer. *Id.*; New York, 505 U.S. at 181-82.

The federal government abridges federalism if it micromanages how a State or local employer disciplines workers even in addressing, through granted powers, the imposition of improper discipline. Rizzo v. Goode, 423 U.S. 362, 369-70, 379-80 (1976). Penalizing States for properly disciplining their workers bleeds the core of State governance more directly than in areas this Court protects from Commerce power intrusion. *Compare* pp. 15-23 *supra* with United States v. Lopez, 115 S.Ct. 1624 (1995). *See* "Symposium: Reflections on United States v. Lopez," 94 Mich.L.Rev. 533-831 (December 1995). Lopez noted Garcia and earlier decisions on extending the FLSA to public employers had cautioned both that the Commerce power had limits and that, in analyzing each exercise, the scope of those limits is "'necessarily one of degree.'" 115 S.Ct. at 1629 and 1633. The Commerce power may not "'effectually obliterate the difference between what is national . . . and local and create a centralized government.'" *Id.* at 1629.

Had the realities State and local employers now experience been presented as a hypothetical, it may have been viewed as among those "horrible possibilities that never happen in the real world." Garcia, 469 U.S. at 556. This view is not new. Hamilton dismissed State concerns

arguing the "moment we launch into conjectures about the usurpations of the federal government, we get into an unfathomable abyss, and fairly put ourselves out of the reach of all reasoning." The Federalist Papers, No. 31, p. 197 (Cooke ed. 1961).[3] In the more concrete and sharpened context presented here, the political process seems a less dependable watchdog over State sovereignty.

The Court may conclude the premise that the political process protects State sovereignty bears reconsideration. The structure of federalism is not self-perpetuating:

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.

Term Limits, 115 S.Ct. at 1872 (Kennedy, J., concurring). Atoms, and sovereignties, which share space do not remain "split" without vigilance. Dominant elements, and dominant sovereignties, naturally tend to control those with less power. The federal government, merely by exercising power, tends to absorb State sovereignty even if that is not its intent. This Court should monitor exercises of federal power, with at least the same careful scrutiny it gives to other constitutional guarantees, to assure the "atom of sovereignty" remains split.

While the facts in New York did not then justify reevaluation of Garcia, the Court held the confines imposed on the Commerce power by the Necessary and Proper Clause (U.S.Const., Art. I, § 8, cl.18) must always

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[3]Hamilton's "federalist" views should be approached with caution. He startled the Convention by proposing to **entirely** eliminate State sovereignty. 1 Farrand, Debates 294-301.

be considered and "a particularly strong federal interest" identified. 505 U.S. at 158-59 and 178. Yet only the Garcia dissenters asked whether extending the FLSA to States was necessary to a federal governmental power and they concluded it was not. Garcia, 469 U.S. at 557, 563, n. 11 (Powell, J., Rehnquist, Burger, C.J., & O'Connor, J. dissenting); *Id.*, 469 U.S. at 580, 584-86 (O'Connor, Powell, & Rehnquist, JJ., dissenting). A reanalysis of Garcia's result may be appropriate, in light of New York, to determine whether extending the FLSA to State and local employers was necessary to serve any particularly strong federal interest. Without revisiting Garcia at all, however, the Court could conclude it is not necessary to any particularly strong federal interest to prohibit States from imposing proper discipline on their workers. New York, 505 U.S. at 158-59 and 178.

The continuing vitality of federalism, which must depend on this Court for protection, may require a broader inquiry. On the "unsteady path" the Court has traveled in analyzing the extension of the FLSA to States, it has been directed to the passive restraints of the Tenth Amendment. *Id.* at 160. Congress also has an affirmative duty to assure States have republican forms of government (U.S.Const. Art. IV, § 4). *E.g.*, Highland Farm Dairy v. Agnew, 300 U.S. 608, 612 (1937). New York noted the confines the Guarantee Clause imposes on Congress's mandates on State government while finding no application there because Congress merely offered monetary incentives to the States. 505 U.S. at 183-85. The "choice" presented to States through the prohibition, to surrender control of discipline or pay overtime to all executives and professionals, is not a mere incentive.

If courts, leaving the Tenth Amendment to the political process and deferring to irrational agency interpretations, consider "nonjusticiable" this affirmative duty under the Guarantee Clause, all meaningful judicial monitoring of the federalist balance is abandoned. The Court hesitates to referee internal political disputes

between warring factions within a State (New York, 505 U.S. at 183-85), but the Guarantee Clause has the added purpose of requiring Congress, exercising its powers, not to obstruct States in operating their own chosen "republican forms of government" and, in that area, courts are the proper arbiters of where federal authority stops and State authority is preserved (*id.*).

The Court could, more narrowly, merely find that Congress did not intend to breach its duties under the Guarantee Clause. *E.g.*, Minor v. Happersett, 88 U.S. 162, 175-76 (1874) (determining intent is not deciding internal political questions). Courts should first determine a statutory interpretation "does not raise serious constitutional concerns." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Tr. Coun., 485 U.S. 568, 577 (1988). Applying the prohibition to States raises serious constitutional concerns under both the Tenth Amendment and the Guarantee Clause. Without an "'affirmative intention of the Congress clearly expressed'" which requires an interpretation fraught with unconstitutional implications, courts, for that reason alone, reject it as presumptively contrary to Congressional intent. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979). If the Tenth Amendment or the Guarantee Clause are beyond judicial cognizance even in determining Congressional intent, the careful federalist structure created by the Founders is lost. Just as "no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." Ullman v. United States, 350 U.S. 422, 428 (1956). Appointing Congress to police itself in not consuming the Tenth Amendment, declaring the Guarantee Clause beyond judicial visibility and deferring to irrational agency interpretations would subordinate or delete Constitutional guarantees of State powers.

Public employers must respond appropriately to misconduct by their workers. "The danger to liberty, the danger of mal-administration, has not yet been found to lie so much in the faculty of introducing improper persons

into office as in the difficulty of displacing those who are unworthy of public trust." J. Madison, 1 Annals of Congress 496 (J.Gales ed. 1789). Congress did not intend, and could not have intended, to drive States towards those dangers and deprive States of the ability to be accountable to their own citizens.

CONCLUSION

The judgment of the appellate court should be affirmed. The Court should clarify that the disciplinary deduction prohibition is not valid in the public sector.

Respectfully submitted,

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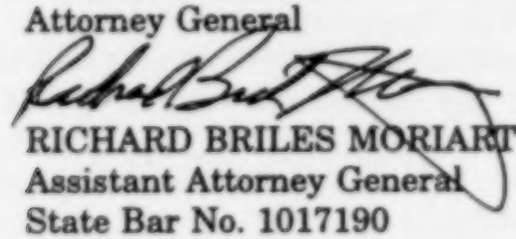

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CONSTITUTIONAL PROVISIONS

Article I, Section 5, of the United States Constitution provides, in relevant part:

> Each House . . . may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Article I, Section 8, of the United States Constitution provides, in relevant part:

> The Congress shall have power
>
> . . . .
>
> To regulate Commerce . . . among the several States, ...
>
> . . . .
>
> To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, ...

Article IV, Section 4, of the United States Constitution provides, in relevant part:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

Article X of the Amendments to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article XIV, Section 1, of the Amendments to the United States Constitution provides, in relevant part:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES

2 U.S.C. § 60-1 states, in relevant part:

> § 60-1. Authority of officers of the Congress over Congressional employees
>
> **(a) . . . discipline**
>
> Each officer of the Congress having responsibility for the supervision of employees, . . . shall have authority--
>
> . . . .
>
> (2) to remove or otherwise discipline any employee under his supervision.

5 U.S.C. Part 3, Ch. 75 (Adverse Actions) provides, in relevant part:

> SUBCHAPTER I--SUSPENSIONS FOR 14 DAYS OR LESS
>
> **§ 7501. Definitions**
>
> For the purpose of this subchapter--
>
> (1) "employee" means an individual in the competitive service [continuously employed for one year and who is not on probation].
>
> (2) "suspension" means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

> **§ 7502. Actions covered**
>
> This subchapter applies to a suspension for 14 days or less, [with exceptions covered by other provisions].
>
> **§ 7503. Cause and procedure**
>
> (a) . . . , an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).
>
> . . . .
>
> SUBCHAPTER II-- . . . SUSPENSIONS FOR MORE THAN 14 DAYS . . . .
>
> **§ 7511. Definitions; application**
>
> (a) For the purpose of this subchapter–
>
> (1) "employee" [with exceptions in 29 U.S.C. § 7511(b)] means–
>
> (A) an individual in the competitive service [continuously employed for one year and who is not on probation]; and
>
> (B) a preference eligible [as specified who] completed 1 year of current continuous service in the same or similar positions;
>
> (2) "suspension" has the meaning as set forth in section 7501(2) of this title;
>
> . . .
>
> **§ 7512. Actions covered**
>
> This subchapter applies to–
>
> . . .
>
> (2) a suspension for more than 14 days [with exceptions covered by other provisions];
>
> . . .

§ 7513. Cause and procedure

(a) . . . an agency may take an action [such as suspension for 14 days or less] for such cause as will promote the efficiency of the service.

. . .

SUBCHAPTER III–
ADMINISTRATIVE LAW JUDGES

§ 7521. Actions against administrative law judges

. . . .

(b) [authorizing suspensions of administrative law judges].

. . . .

SUBCHAPTER IV–NATIONAL SECURITY

. . . .

§ 7532. Suspension and removal

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. . . .

. . . .

SUBCHAPTER V–SENIOR EXECUTIVE SERVICE

§ 7541. Definitions

(a) For the purpose of this subchapter–

(1) "employee" means a career appointee in the Senior Executive Service who [has completed probation and was covered by subchapter II immediately before appointment to the Senior Executive Service.]

(2) "suspension" has the meaning as set forth in section 7501(2) of this title.

§ 7542. Actions covered

This subchapter applies to a . . . suspension for more than 14 days [with exceptions covered by other provisions].

§ 7543. Cause and procedure

(a) . . . an agency may take an action [such as suspension for more than 14 days] only for such cause as will promote the efficiency of the service.

. . . .

29 U.S.C. § 203, as amended in 1974, states, in relevant part:

§ 203. Definitions

As used in this chapter–

. . . .

(c) "State" means any State of the United States . . .

(d) "Employer" includes . . . a public agency . . . .

(e)(2) In the case of an individual employed by a public agency, ["employe"] means–

. . . .

(C) any individual employed by a State . . . [with narrow exceptions]

. . . .

(x) "Public agency" means . . . the government of a State . . . [or] a State . . . .

29 U.S.C. § 207(a)(1) provides, in relevant part:

(a)(1) . . . [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 213(a) provides, in relevant part:

> **(a)** The provisions of section[] . . . 207 of this title shall not apply with respect to—
>
> **(1)** any employee employed in a bona fide executive, administrative, or professional capacity, . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of USDOL], subject to the provisions of [the Administrative Procedures Act, 5 U.S.C. §§ 551-559] . . .); . . .

UNITED STATES REGULATIONS INVOLVED

5 C.F.R. Part 551, Subpart B—promulgated by the Civil Service Commission and later adopted by its successor, the Office of Personnel Management—provides:

SUBPART B—EXEMPTIONS

§ 551.201 Agency authority.

The employing agency shall exempt from the overtime provisions of the Act any employee who meets the exemption criteria of this subpart and such supplemental interpretations or instructions as shall be issued by the Office of Personnel Management.

§ 551.202 General principles governing exemptions.

In all exemption determinations, the agency shall observe the principles that-

(a) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(b) The burden of proof rests with the agency that asserts the exemption.

(c) All employees who clearly meet the criteria for exemption must be exempted.

§ 551.203 Exemption of General Schedule employees.

(a) Any employee properly classified at GS-4 or below (or the equivalent level in other white collar pay systems) shall be nonexempt;

(b) Any employee properly classified at GS-5 through GS-10 (or the equivalent level in other white collar pay systems) shall be exempt only if the employee is an executive, administrative, or professional employee as defined in §§ 551.204, 551.205, and 551.206 of this subpart.

§ 551.204 Executive exemption criteria.

An "executive" employee is a supervisor, foreman, or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and regularly and customarily directs the work of at least three subordinate employees (excluding support employees) and meets all the following criteria:

(a) The employee's primary duty consists of management or supervision. The primary duty requirement is met if the employee--

(1) Has authority to select or remove, and advance in pay and promote, or make any other status changes of subordinate employees, or has authority to suggest and recommend such actions with particular consideration given to these suggestions and recommendations; and

(2) Customarily and regularly exercise discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

(b) In addition to the primary duty criterion that applies to all employees, foreman level supervisors in the Federal Wage System (or the equivalent in other wage systems), employees at the GS-7 through GS-9 level subject to section 207(k) of Title 29, United States Code, and employees classified at the GS-5 or GS-6 level (or equivalent in other white collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work.

§ 551.205 Administrative exemption criteria.

. . .

§ 551.206 Professional exemption criteria

A professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) The employee's primary duty consists of -

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher

degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends of the invention, imagination, or talent of the employee.

(b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

(c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other systems), must spend 80 percent or more of the worktime in a representative workweek in professional functions and work that is an essential part of those functions.

29 C.F.R. § 541.1—promulgated by USDOL—provides, in relevant part:

§ 541.1 Executive.

The term "employee employed in a bona fide executive . . . capacity" in [29 U.S.C. § 213(a)(1)] shall mean any employee:

(a) [through (e) detail criteria as to duties.]; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week . . . , exclusive of board, lodging, or other facilities: *Provided* [that an employe compensated on a salary basis at not less than $250 per week is presumed to meet certain of the above duties criteria]

29 C.F.R. § 541.3—promulgated by USDOL—provides, in relevant part:

§ 541.3 Professional.

The term employee *employed in a bona fide . . . professional . . . capacity* in [29 U.S.C. § 213(a)(1)] shall mean any employee:

(a) [through (e) detail criteria as to duties.]; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week . . . exclusive of board, lodging, or other facilities: *Provided*, [that an employe compensated on a salary or fee basis at not less than $250 per week is presumed to meet certain of the above duties criteria].

29 C.F.R. § 541.5d—promulgated by USDOL and effective September 18, 1992 (57 Fed. Reg. 37666 and 37677)—provides:

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under § 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employe of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough occurs and for which the employe's pay is accordingly reduced.

OTHER MATERIALS

29 C.F.R. § 541.118–issued by USDOL–provides, in relevant part:

> **§ 541.118 Salary basis.**
>
> (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.
>
> . . .
>
> (5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.
>
> (6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made where there is no work available, it indicates there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.
>
> . . .

H. Weiss, Report and Recommendations on Proposed Revisions of Regulations, Part 541 24-26 (USDOL June, 1949) (the Weiss Report) states, in relevant part:

> . . .
>
> The notice of hearing invited evidence on the need for revision or definition of the term "on a salary . . . basis." . . . The evidence at hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term "bona fide" executive. Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment. The proposals to eliminate the requirement and to apply an hourly rate or average earnings test may therefore be rejected as inconsistent with true executive, administrative or professional status.
>
> A number of questions have arisen in the past in connection with the interpretation of the phrase "on a salary . . .

basis" particularly with respect to the effect of deductions on the salaried status of an employee. The problem became of some importance during the war when the practice of making such deductions was adopted by some companies engaged in war production as a disciplinary measure to discourage absenteeism among executive and administrative employees. This practice raised serious questions as to whether any employees to whom it was applied were actually employed "on a salary . . . basis" in accordance with the provisions of the regulations. Investigation by the Divisions indicated that this changed practice had become sufficiently widespread to warrant the conclusion that the wartime industrial practice differed from the pre-war practice and that such disciplinary deductions were no longer inconsistent with payment "on a salary . . . basis." In an effort to meet the wartime problems and to clarify the meaning of the term "on a salary . . . basis" the Divisions issued a restatement of position, the pertinent portion of which follows:

> . . . [T]he fact that less than [an exempt's employee's predetermined amount] is paid for a particular pay period because disciplinary deductions are made for unreasonable absences would not in itself prove that the employee is not employed on a salary basis. [Nonetheless, exempt employes must be given more latitude in taking absences than non-exempt employees.]

As a result of this statement of position, the problems created by the peculiar wartime conditions in many plants were solved but as an incident thereof, numerous administrative difficulties were encountered. For example, employers as well as the Divisions were faced with the need for determining in particular cases whether absences were reasonable or unreasonable and whether unreasonable absences included absences for longer periods than were allowed under established company plans for sick leave and "annual" leave. Since the answer to this latter question was determined to depend upon the reasonableness of the particular leave plan, employers had to decide for themselves and the Divisions in many instances were compelled to rule on specific leave plans to determine whether the leave plans were "reasonable" in nature. Employers were thus subject to considerable uncertainty prior to obtaining the opinion of the Divisions and the Divisions were faced with an undesirable administrative burden given such opinions. In my opinion, moreover, the building of such an elaborate structure of interpretation upon the simple phrase "on a salary . . . basis" should be avoided if possible in the interests of good administration.

The testimony at the hearings indicated that the practice of disciplining bona fide executive, administrative, and professional employees by making deductions from their salaries had been a wartime phenomenon, resulting from rapid upgrading, the pressure of long hours, and other temporary conditions. Such deductions are rarely made today. The

disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary. There appears to be no present need for a definition of "salary basis" as difficult to apply as the one now followed by the Divisions, particularly since it is not consistent with the common understanding of the phrase as it applies to bona fide executive, administrative, and professional employees. In view of the changed conditions, payment of anything less than the full salary seemed to cast doubt upon the bona fide character of the employee's executive, administrative, and professional status.

. . .

14 Fed. Reg. 7703 and 7735 (December 28, 1949)—published by USDOL to create 29 C.F.R. § 541.118 and other "interpretations"—states, in relevant part:

TITLE 29—LABOR

. . .

PART 541— . . .

INTERPRETATIONS OF REGULATIONS

. . .

. . . [Revisions of the regulations were published on December 24, 1949 as 29 C.F.R. Part 541, Subpart A.] For the purpose of outlining and explaining the application of these regulations to specific types of situations, an explanatory bulletin has been prepared which interprets these regulations in the light of their application to specific factual situations. This explanatory bulletin contains statements of general policy and interpretations directly related to the regulations . . . . The text of such explanatory bulletin [quoting § 541.118 in its entirety] is as follows:

SUBPART B—INTERPRETATIONS

. . .

§ 541.118 *Salary basis.* (a) An employee will be considered to be paid on a salary basis within the meaning of the regulations in Subpart A of this part, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the workweek or in the quality or quantity of the work performed. The employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.

(b) *Minimum guarantees plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $55 or more a week and, in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of his branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations in Subpart A of this part. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if

the employment arrangement includes a provision that he will receive not less than the amount specified in the regulations in Subpart A of this part in any week in which he performs any work. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $100 may not arbitrarily be divided into a guaranteed minimum of $55 paid in each week in which any work is performed, and an additional $45 which is made subject to deductions.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. For this purpose, an extended voluntary leave of absence may be considered to come within this rule. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations in Subpart A of this part if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations in Subpart A of this part.

19 Fed. Reg. 1321-1322 (March 9, 1954)—published by USDOL as to 29 C.F.R. § 541.118—states, in relevant part:

COMPENSATION "ON A SALARY BASIS"

Notice is hereby given that [USDOL] proposes to amend § 541.118 of Part 541, Subpart B (29 C.F.R. Part 541), as follows:

. . .

(5) . . . Penalties imposed in good faith for infractions of safety rules, or for other major disciplinary reasons, will not affect the employee's salaried status.

. . .

Prior to the final adoption of the proposed amendment set forth above, consideration will be given to any views, arguments or data pertaining thereto [submitted to USDOL] within 30 days [of publication].

19 Fed. Reg. 4405-4406 (July 17, 1954)—published by USDOL as to 29 C.F.R. § 541.118—states, in relevant part:

COMPENSATION "ON A SALARY BASIS"

. . .

The comments [received in response to the March 9, 1954 notice] have been carefully considered. On the basis of the comments, the provision that penalties may be imposed for major disciplinary reasons has been deleted, and the provision regarding penalties for infractions of safety rules has been clarified. The modified language will be found in § 541.118(a)(5). In all other respects, the amendment is adopted as proposed.

. . .

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to

the prevention of serious danger to the plant or other employes, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

40 Fed. Reg. 27640 to 27641—published by the Civil Service Commission to create 5 C.F.R. Part 551 (Pay Administration Under the Fair Labor Standards Act) effective July 1, 1975—stated:

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

Exemptions

A new Part 551 is being added to Chapter I of 5 CFR, under [29 U.S.C. § 204(f)] as amended by Pub. L. 93-259 enacted April 3, 1974, which states:

> Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than any individual employed by the United States Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority).

Partial regulations governing exemptions are issued at this time, with regulations on other aspects to follow.

These regulations are issued without prior publication in proposed form. Because this is a matter relating to agency management and personnel practices, the provisions of the Administrative Procedure Act (now codified in 5 U.S.C. 553) concerning notice of proposed rule-making, opportunity for public participation, and delay in effective date are inapplicable.

The Civil Service Commission has, however, provided opportunity for all interested parties, including Federal agencies and employee organizations, and the public to comment on the issues covered by the exemption regulations. This opportunity was provided through circulation, in July 1974, to Federal agencies and unions representing Federal employees, of a draft proposing expansion of the interim instruction on exemption criteria with a request for comment, and through a formal public hearing notice of which was published on September 16, 1974 in the Federal Register (39 FR 33255).

The comments received reflected widely divergent views concerning the exemption criteria. The Commission has resolved the issues raised in terms of the policy of integrating exemption criteria with Federal classification systems to the extent possible, while maintaining results consistent with the exemption criteria applied by the Department of Labor.

In accordance with the foregoing, Chapter I of Title 5 of the Code of Federal Regulations is amended by adding a new Part 551, reading as follows:

[promulgating regulations in essentially the same format as the present regulations by the Commission's successor, the Office of Personnel Management, at 5 C.F.R. Part 551, Subpart B.]

50 Fed. Reg. 47696-47997 (November 19, 1985)—published by USDOL as to 29 C.F.R. Part 541—states, in relevant part:

SUMMARY: The Wage and Hour Division is considering proposing revisions [to 29 C.F.R. Part 541] . . . . Comments are invited concerning the current definitions of terms relating to the salary, duties, and responsibilities tests for [exempt] employees, as well as the interpretations of such definitions.

. . .

Accordingly, comments are sought from interested parties concerning the matters set forth below, as well as any other issues of interest under this regulation.

I. Salary Tests.

. . . Comments are sought with respect to the following matters related to the salary tests:

. . .

2. Should the salary tests be eliminated? If so, what tests should [USDOL] rely on to determine applicability of the 29 U.S.C. § 213(a)(1)] exemption? What would be the economic impact of the elimination of the salary tests?

. . .

10. Should [USDOL] recognize individual State and local government civil service systems for classifying [executive, professional and administrative] employees in applying the exemption to employees of such governments? Such recognition would not alter the traditional FLSA principle that an employer who claims an exemption under the Act has the burden of showing that it applies.

Colorado Senate Bill 96-021, as enacted April 8, 1996, provides:

1996

An Act

SENATE BILL 96-021

BY SENATORS Hernandez, R. Powers, Thiebaut, and Johnson;
also REPRESENTATIVES Acquafresca, Anderson, Friednash, Prinster, and Clarke.

CONCERNING THE PENALTY ASSESSED TO SUPERVISORS IN THE STATE PERSONNEL SYSTEM FOR FAILURE TO COMPLETE MANDATORY ANNUAL PERFORMANCE EVALUATIONS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 24-50-118 (3) (a) and (4), Colorado Revised Statutes, 1988 Repl. Vol., as amended, are amended to read:

24-50-118. Service and performance evaluations - system and use. (3) (a) A supervisor, which for purposes of this section shall include exempt supervisors of classified employees, who does not evaluate his OR HER subordinate employees, as provided in this section, on at least an annual basis shall be ~~fined an amount not less than the equivalent of three days' salary~~ SUSPENDED FROM WORK WITHOUT PAY FOR A PERIOD OF NOT LESS THAN ONE WORKWEEK.

(4) The state personnel director shall monitor compliance with subsection (3) of this section and shall report ~~his~~ THE DIRECTOR'S findings annually on January 1 to the joint budget committee of the general assembly. Said report shall include: The number of supervisors who were demoted or terminated, and the percentage of all supervisors who acted in compliance with this section.

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

SECTION 2. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

/s/
Tom Norton
PRESIDENT OF
THE SENATE

/s/
Charles E. Berry
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

/s/
Joan M. Albi
SECRETARY OF
THE SENATE

/s/
Judith M. Rodriguez
CHIEF CLERK OF
THE HOUSE OF
REPRESENTATIVES

APPROVED August 8, 1996 at 10:47 a.m.

/s/
Roy Romer
GOVERNOR OF THE STATE
OF COLORADO